No. 138, Original

IN THE

Supreme Court of the United States

October Term 2008

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

FIRST INTERIM REPORT OF THE SPECIAL MASTER

KRISTIN LINSLEY MYLES
Special Master

November 25, 2008

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FIRST INTERIM REPORT OF THE SPECIAL MASTER

I.

In this original jurisdiction action, the State of South Carolina seeks an equitable apportionment of the Catawba River, which originates in the mountains of North Carolina and flows through the western portion of that state before passing into South Carolina at Lake Wylie. This Interim Report is submitted in connection with motions by the City of Charlotte, North Carolina ("Charlotte"), the Catawba River Water Supply Project ("CRWSP"), and Duke Energy Carolinas, LLC ("Duke Energy" or "Duke") to intervene in the action, as well as a motion by South Carolina for clarification or reconsideration of the Special Master's initial order granting the intervention motions. For the reasons set forth below,

the Special Master recommends that the proposed interventions be allowed.[1]

II.

This case began in June 2007 when the State of South Carolina filed a motion for leave to file its Complaint against the State of North Carolina. In the proposed Complaint, South Carolina sought an equitable apportionment of the Catawba River, and also sought to enjoin North Carolina from approving transfers of water from the Catawba River Basin to other river basins in a manner inconsistent with the requested apportionment. North Carolina opposed the motion, in part on the ground that the flow of the Catawba River was being addressed in proceedings before the Federal Energy Regulatory Commission ("FERC") relating to a relicensing application by Duke Energy. In August 2007, while South Carolina's motion for leave to file the Complaint was pending, South Carolina moved for a preliminary injunction to prevent North Carolina from authorizing transfers of water from the Catawba River beyond those previously authorized. North Carolina opposed that motion as well. On October 1, 2007, the Court granted South Carolina's motion for leave to file the Complaint, and directed North Carolina to file an Answer. On the same day, the Court denied South Carolina's motion for a preliminary injunction. North Carolina filed its Answer on November 30, 2007.

South Carolina's Complaint does not contain separate counts or causes of action. Rather, it sets out

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[1] For the convenience of the Court, the prior orders and other proceedings in this action can be accessed through the electronic docket maintained at http://www.mto.com/sm.

factual allegations concerning the Catawba River, including a general statement of the uses each State makes of the water from the river, facts concerning the flow of the river, and the prayer for an apportionment and for injunctive relief. South Carolina alleges that the Catawba River is used in both North and South Carolina for hydroelectric power, irrigation, mining, thermoelectric water use, water supplies, and other uses. Complaint ¶ 11. It alleges that the Catawba River Basin is a densely populated area that is expected to experience significant population growth over the next decade. It alleges that the Catawba is subject to severe periodic fluctuations in water level, and that its flow historically has been affected by prolonged droughts. *Id.* ¶ 15. South Carolina alleges that it and its citizens suffered harm as a result of conditions caused by a recent drought ending in late 2002. *Id.* ¶ 17.

South Carolina's Complaint and accompanying papers focus upon the role of the Catawba in generating hydroelectric power for use in both North Carolina and South Carolina—a topic that bears upon the intervention motion filed by Duke Energy. According to South Carolina, after efforts in the 19th century to make the river navigable proved unsuccessful, it became apparent that the most productive use of the river would be for electrical power. Motion for Leave to File Complaint at 3. The entity now known as Duke Energy was formed, principally to generate power for the region's cotton mills. *Id.* Duke Energy owns and operates a system of 11 reservoirs—six in North Carolina, four in South Carolina, and one at Lake Wylie, on the border between the two States—all of which are subject to a 50-year license issued to Duke Energy by the Federal Power Commission ("FPC") in 1958. *Id.* at 3-4.

South Carolina's Complaint also cites data generated as part of the above-referenced relicensing process pending before the FERC, the successor to the FPC. In anticipation of the need to renew its FPC license, which was to expire in 2008, Duke Energy initiated a multi-stakeholder negotiation process to address issues of concern to those using the Catawba, including issues of water level and flow. The result was a "Comprehensive Relicensing Agreement" ("CRA") among Duke and other stakeholders, including groups from both North and South Carolina, and specifically including the South Carolina Department of Natural Resources. Duke Energy submitted the CRA as part of its relicensing application, which remains pending before the FERC—Duke's original license having been extended by one year to allow for certain approvals necessary for the new license.

South Carolina alleges in its Complaint that, as part of the relicensing negotiations that led to the CRA, the various stakeholders agreed that the minimum continuous flow that South Carolina should receive from the Catawba River is 1,100 cubic feet per second—or about 711 million gallons per day. Complaint ¶ 15. South Carolina alleges that, because of the fluctuations in water supply in the river, the flow sometimes is below that level. *Id.* South Carolina alleges that a scientific model developed by Duke Energy as part of the relicensing negotiations showed that even in its "natural" state—that is, absent the reservoir system that currently exists—the river often would not deliver 1,100 cubic feet per second into South Carolina. *Id.* ¶ 16.

As for specific actions by North Carolina, the Complaint alleges that the harms to South Carolina from

reduced flow in the Catawba River have been exacerbated by a North Carolina statute, enacted in 1991, that requires a person or entity wishing to transfer 2 million or more gallons of water per day from specified river basins, including the Catawba, to obtain a permit from the North Carolina Environmental Management Commission ("EMC"). Complaint ¶ 18, citing N.C. Gen. Stat. §§ 143-215.22G(1)(h) & 143-215.22I(a)(1)-(2).[3] South Carolina alleges that this statute "implicitly authorize[s]" transfers of less than 2 million gallons "without regulation by the EMC." *Id.* South Carolina alleges that the EMC has granted at least two permits that allow the transfer of tens of millions of gallons of water per day from the Catawba to the Rocky River Basin—namely, a March 2002 permit allowing the Charlotte-Mecklenburg Utilities to transfer up to 33 million gallons per day, and a January 2007 permit allowing the Cities of Concord and Kannapolis to transfer up to 10 million gallons per day. *Id.* ¶ 20. South Carolina also points to an existing authorization to Union County to transfer at least 5 million gallons per day, and a pending application by Union County to increase that authorization by 13 million gallons per day. South Carolina alleges that it does not know the extent to which the North Carolina statute has "implicitly permitted" transfers under 2 million gallons a day, or the extent to which entities have taken advantage of an exception to the permitting requirement for transfers up to

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[3] In 2007, the North Carolina General Assembly repealed the 1991 statute cited by South Carolina in its Complaint, and replaced it with a new statute that imposes some additional requirements on applicants for interbasin transfers. *See* N.C. Gen. Stat. § 143-215.22L, effective August 31, 2007. The changes do not appear to be material for purposes of the present Report.

the full capacity of facilities that existed or were under construction as of July 1, 1993. *Id.* ¶¶ 22-23.

South Carolina alleges that these interbasin transfers from the Catawba have reduced the amount of water flowing into South Carolina and exacerbated the existing natural conditions and droughts that cause low flow conditions in South Carolina. South Carolina claims that the transfers also "are in excess of North Carolina's equitable share of the Catawba River." Complaint ¶ 24.

For its prayer for relief, South Carolina asks that the Court enter a decree "declaring that the North Carolina interbasin transfer statute cannot be used to determine each State's share of the Catawba River and equitably apportioning the Catawba River." South Carolina further seeks a decree "enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with that apportionment, and also declaring that the North Carolina interbasin statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment as determined by this Court's decree." Complaint at 10; *see also id.* ¶ 4.

In its Answer, North Carolina agrees that severe drought conditions have affected the flow of the Catawba and of other rivers in the two States, but denies that its own actions were the cause of any harms to South Carolina. Answer ¶¶ 2, 17-18. In particular, North Carolina denies that any such harms were exacerbated by the North Carolina statute regulating interbasin transfers, or that any transfers it authorized—including those to Charlotte-Mecklenburg and Union County—exceed North Carolina's equitable share of the Catawba River. *Id.* ¶¶ 3, 20(a), 21. It contends that the flows in the Catawba River fluctu-

ate "as a result of several factors, including requirements imposed pursuant to a license issued by [FERC] and the operation of hydroelectric generation facilities located on the River." *Id.* ¶ 2.

North Carolina asserts a series of affirmative defenses to South Carolina's claims, including that the issues raised by South Carolina are being addressed in the FERC proceedings relating to Duke's relicensing application, and that South Carolina's position amounts to "nothing more than a difference of opinion with the manner in which a FERC-regulated hydroelectric project stores and releases flows." Answer ¶ 32(a). North Carolina also alleges that the reduction in flow resulting from drought conditions is "avoidable by revisions to the operational parameters of the several hydroelectric dams that populate the Catawba River." *Id.* North Carolina alleges, based upon the existence of the FERC-regulated hydroelectric dams and other federal interests within the Catawba-Wateree-Santee River Basin, that the United States is an indispensable party to the litigation. *Id.* ¶ 36. To date, the United States has not sought leave to intervene in this action, nor has any party sought either to join it as a party or formally to request its views.

III.

In November 2007, Duke Energy and CRWSP filed motions for leave to intervene as defendants in this action. In February 2008, a third motion for leave to intervene as a defendant was filed by Charlotte. South Carolina opposed all three motions, and North Carolina took no position. The Special Master held a hearing on the three motions on March 28, 2008, in Richmond, Virginia, and, on May 27, 2008, issued an order granting the motions. On June 27, 2008, South

Carolina filed a motion for clarification or, in the alternative, for reconsideration of the May 27, 2008 order. The three parties who had successfully moved for intervention (the "Intervenors") opposed the motion. A Telephonic Conference was held on July 17, 2008 at which the Special Master indicated that the motion would be denied.

On July 30, 2008, South Carolina requested for the first time that the Special Master issue the May 27, 2008 order granting intervention, and any written order denying the motion for clarification or reconsideration of that order, as an Interim Report to this Court, so that South Carolina could present exceptions to these rulings. North Carolina and the Intervenors opposed the request. During a Telephonic Conference held on August 22, 2008, the Special Master indicated that she would grant South Carolina's request and submit an Interim Report on the subject of intervention.

In the meantime, discovery commenced, and the parties made progress on the preparation of a Case Management Plan to govern the action. Following the May 27, 2008 order granting intervention, discovery also began between the parties and the Intervenors. On September 18, 2008, in response to disputes among the parties and the Intervenors as to how to proceed pending this Court's consideration of the question of intervention, the Special Master issued an order governing discovery by and from the Intervenors pending proceedings in this Court.

A separate dispute arose and was resolved concerning the scope of the pleadings and of the issues open for discovery. North Carolina contended that South Carolina's Complaint was limited—and that discovery likewise should be limited—to the propriety

of North Carolina's practice of authorizing transfers of water from the Catawba River to other river basins in North Carolina. North Carolina further sought to limit South Carolina's case to the harms caused to South Carolina by interbasin transfers during times of drought, and on the portion of the Catawba upstream of Lake Wateree. South Carolina contended that its Complaint was not so limited, and that restrictions on discovery at this stage would not be appropriate. The Special Master resolved the dispute in an order dated September 24, 2008. The Special Master agreed with North Carolina that interbasin transfers were the central focus of the Complaint, and that the harms that South Carolina alleged focused primarily upon drought conditions and the upstream portion of the river as it flowed through South Carolina, but concluded that the general prayer for an equitable apportionment of the Catawba would permit consideration of other factors, so that a blanket limitation on discovery at the initial stage was not warranted.

IV.

In their original motions, the three Intervenors contended that they have substantial interests in this dispute and should be allowed to intervene. Two of the Intervenors, Charlotte and CRWSP, are entities authorized to carry out the inter-basins transfers to which South Carolina objects. Charlotte is the largest municipality on the Catawba and is the beneficiary of the March 2002 permit allowing Charlotte-Mecklenburg Utilities to transfer up to 33 million gallons per day. CRWSP is a joint venture between units of government of North and South Carolina. One of its two participants is Union County, North Carolina, which is authorized under the North Caro-

lina law to transfer up to 5 million gallons per day from the Catawba.

Duke Energy, the third Intervenor, owns and operates a system of 11 reservoirs in both States to provide hydroelectric power to the region, pursuant to its 50-year license issued by the FPC. In its original motion, Duke contends that the impounding of water in its reservoirs and its releases of that impounded water play a substantial role in determining the flow of the Catawba River. It also contends that the terms of its current and future licenses are crucial to any consideration by this Court of whether and how equitably to apportion the Catawba River. Duke asserts that its interests are not aligned with those of either State, but that it has a strong and unique interest in defending the conditions set forth in the CRA and also can provide an essential link to the ongoing licensing proceedings before the FERC.

As noted above, the Special Master initially granted the three motions to intervene in an order dated May 27, 2008. It was only after the parties had briefed South Carolina's motion for clarification or reconsideration of the May 27, 2008 ruling, and after the Special Master had indicated that the motion would be denied, that South Carolina formally requested that the Special Master issue the intervention ruling as an Interim Report to this Court. Accordingly, this Interim Report incorporates both the original rationale of the May 27, 2008 order and the ruling on the motion for clarification or reconsideration.

V.

Article III, § 2 of the Constitution gives the Court original jurisdiction of cases "in which a state shall be party." "This jurisdiction is self-executing, and needs

no legislative implementation." *California* v. *Arizona*, 440 U.S. 59, 65 (1979). Congress has expanded upon the original jurisdiction clause of Article III by providing in Section 1251(a) of Title 28 that the Court has "original and exclusive" jurisdiction of "all controversies between two or more States." 28 U.S.C. § 1251(a).

A state invokes the Court's original jurisdiction "as *parens patriae*, trustee, guardian, or representative of all or a considerable portion of its citizens," and may take actions to protect its citizens from injury to their property, health, and comfort. *Kansas* v. *Colorado*, 185 U.S. 125, 142 (1902). The *parens patriae* doctrine "is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens." *New Jersey* v. *New York*, 345 U.S. 369, 372 (1953). This principle is not only "a necessary recognition of sovereign dignity," but also "a working rule for good judicial administration." *Id.* at 373. "Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.*

The *parens doctrine* is directly implicated by actions between states to apportion waters from interstate rivers. Because states represent the interests of their citizens in equitable apportionment and other original actions, the citizens of a state that is a party to an original action are bound by the results of that action. Indeed, the Court has "said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their

respective States." *Nebraska* v. *Wyoming*, 515 U.S. 1, 22 (1995); *see also Wyoming* v. *Colorado*, 286 U.S. 494, 508-09 (1932).

These general principles, taken to their logical conclusion, could have produced a rule that only states—and not municipalities, private companies, or other interested entities—may be parties to an original action in this Court pursuant to Article III, § 2 of the Constitution and Section 1251(a) of Title 28. Nonetheless, neither text contains any such limitation, and the Court's practice has been to allow non-state entities in appropriate circumstances to join, or be joined in, an original action, even if the non-state entity is a citizen of one of the state parties and thus would be bound by the resulting judgment under the principles discussed above.

The Court considered this issue—and the appropriate standard for a motion by such an entity to intervene in an original action—in *New Jersey* v. *New York*, 345 U.S. at 369. That case involved a motion by the City of Philadelphia for leave to intervene in a case brought by the State of New Jersey against the State of New York and the City of New York to enjoin a proposed diversion of the Delaware River for use by the City of New York. At the outset of the case, the Commonwealth of Pennsylvania successfully petitioned the Court for leave to intervene as a plaintiff. *Id.* at 371. More than two decades later, after the City of New York moved to modify the decree entered in the case, Philadelphia filed its own motion for leave to intervene as a plaintiff. *Id.* The motion was opposed by the parties, in part on the ground that the presence of a non-state plaintiff (Philadelphia), seeking affirmative relief against a defendant state (New York), would violate the Eleventh Amendment.

The Court denied Philadelphia's motion, finding that "Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters." *New Jersey* v. *New York*, 345 U.S. at 373. The Court stated that if it "evaluate[d] all the separate interests within Pennsylvania," it could "be drawn into an intramural dispute over the distribution of water within the Commonwealth." *Id.* The Court also noted that, if Philadelphia intervened, other cities and private entities along the river would seek to do the same. *Id.* To prevent the Court's original jurisdiction from being "expanded to the dimensions of ordinary class actions," the Court held that a proposed intervenor such as Philadelphia must show "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 373. Because Philadelphia was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests," the Court denied the motion. *Id.* at 374.

The Court did not expand upon the types of interests that might be considered sufficiently compelling to warrant intervention. It did, however, distinguish the position of Philadelphia from that of the City of New York, which already was a party. As the Court explained, New York City "was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." *New Jersey* v. *New York*, 345 U.S. at 375. Unlike Philadelphia, whose sole interest in the dispute was as a downstream user of water, and which

sought to intervene as a plaintiff, the City of New York was the "authorized agent" of injury and one of the parties against which coercive relief was sought; for these reasons, the Court noted, it had been named as a defendant. *Id.* The Court found this relevant because, unlike with Philadelphia's proposed intervention as a plaintiff seeking relief against a state, the presence of New York in the case created "no problems under the Eleventh Amendment." *Id.* In addition, whereas Philadelphia was situated similarly to numerous other downstream users, both political subdivisions and private entities, the City of New York stood alone with the State of New York as being named by the plaintiff as the instrument of injury—*i.e.*, as an entity that "was planning the actual diversion of the water for its use." *Id.* at 370-71.

On other occasions the Court has allowed non-state entities such as municipalities to be named as defendants in water disputes between two states where the municipality or other non-state entity was accused of being the agent of injury or executing the policy to which the complaining state objected. For example, the Court allowed an action by the State of Missouri against the State of Illinois and the Sanitary District of Chicago to enjoin the latter's discharge of sewage into the Chicago River and from there to the Mississippi River. *Missouri* v. *Illinois*, 180 U.S. 208, 242 (1901). The Court found that it was proper for Missouri to name as defendants both the Sanitary District and the State of Illinois, because the Sanitary District was acting pursuant to state authority as "an agency of the state to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended." *Id.* The Court allowed the State of Arizona to file an action to resolve rights to the Colorado River, naming as de-

fendants the State of California and seven of its public agencies, which were accused of improperly diverting water from the river. *Arizona* v. *California*, 373 U.S. 546, 551 (1963); *see also Arizona* v. *California*, No. 8, Orig. (U.S.), Bill of Complaint, pp. 16-19 (1952). In a case primarily brought against the State of Colorado, the Court allowed the State of Kansas to name as defendants "a number of corporations, who were charged to be engaged in depleting the flow of water in the Arkansas river." *Kansas* v. *Colorado*, 206 U.S. 46, 49 (1907). In another case by Colorado against Kansas to settle rights to the Arkansas River, the Court allowed Colorado to name as a defendant the Finney County Water Users' Association, a Kansas organization. *Colorado* v. *Kansas*, 320 U.S. 383 (1943). The Court ultimately granted Colorado's request for an order enjoining Finney from prosecuting certain pending actions against Colorado water users. *Id.* at 388-91. And in *New York* v. *New Jersey*, 256 U.S. 296, 302 (1921), the Court allowed an action by the State of New York against the State of New Jersey and the Passaic Valley Sewerage Commissioners, seeking an injunction against the discharge of sewage into Upper New York Bay—a discharge that, according to New York, was being carried out by the Sewerage Commission. In some of these cases, the question arose whether the defending *state* was a proper party (and thus whether the action was properly brought within the Court's original jurisdiction) because the alleged harm was being carried out by the state agency, not the state itself. *See, e.g., id.* at 302; *Missouri* v. *Illinois*, 180 U.S. at 242. But there was no suggestion that the state agency was not properly named where the agency was alleged to be the agent or instrumentality of the harm to the complaining state.

To be sure, the cases discussed in the foregoing paragraph involved situations in which the non-state entities were named as defendants by the complaining state, and thus did not voluntarily seek the Court's permission to intervene. The Court made this point in *New Jersey* v. *New York*, noting that the City of New York, unlike the City of Philadelphia, had been "forcibly joined" in the action. 345 U.S. at 375. But the cases also clearly illustrate the Court's consistent practice of permitting defendant status for non-state entities that have a legitimate and logical place in the controversy, including as the agent or instrumentality of the wrongdoing alleged by the complaining state. Both types of cases—those in which a non-state entity is named as a defendant as an original matter, and those, such as the present case, in which such an entity seeks to intervene as a defendant—implicate concerns over the purposes of the Court's original jurisdiction, and the need correspondingly to limit the parties that may participate in original actions. But in both types of cases, the Court's precedents would appear to allow non-state entities to become defendants in appropriate circumstances. Such circumstances include, as the above cases show, those in which the non-state entity is the "authorized agent" for a transfer or diversion of water challenged by the complaining state. *See, e.g., id.* at 375.

There also is not a compelling logical distinction between original jurisdiction cases in which the complaining state names an entity as a defendant, and those in which a party seeks to intervene as a defendant. The maxim that the plaintiff is the "master of its complaint" has less force in original jurisdiction cases, because it is the Court—and not the complaining state—that ultimately decides whether

and in what form the Court's original jurisdiction will be exercised. Even in cases between states, the Court may limit its original jurisdiction or decline to exercise such jurisdiction altogether. *See, e.g.*, *Mississippi* v. *Louisiana*, 506 U.S. 73, 76-77 (1992); *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992). *See also* V.L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185 (1993). If a case does not "sufficiently implicate the unique concerns of federalism" underlying the grant of original jurisdiction, *Maryland* v. *Louisiana*, 451 U.S. 725, 743 (1981), the Court may deny leave to file a bill of complaint. A state seeking to initiate litigation in the Court may not simply file a complaint, but must file a motion seeking leave under the Court's Rule 17, which allows a complaint only in "appropriate cases." *Wyoming* v. *Oklahoma*, 502 U.S. at 451. Among the factors the Court considers is "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (citations omitted).

Consistent with these principles, the Court also has power to control the parties to an original action. If the plaintiff state seeks leave to file a complaint that unnecessarily names non-state parties, the Court may either deny the request or dismiss the non-state parties. For example, the Court has dismissed non-state parties named as defendants by the complaining state where the Court found that their interests would be represented sufficiently by the defendant state. In *Kentucky* v. *Indiana*, the Court made clear that party states are deemed to represent the interests of all of their citizens unless "relief is properly sought as against" the individual citizen. 281 U.S.

163, 173 (1930). That case involved an interstate compact between the party states to build a bridge across the Ohio River. Indiana citizens sued in state court to enjoin the construction of the bridge, and the resulting delay caused Indiana to breach the compact. Kentucky sought leave to file a bill of complaint against (1) Indiana, to compel specific performance of the contract and (2) the private plaintiffs in the state court action, to enjoin prosecution of that action. The Court granted leave to file the complaint, but later dismissed it as to the individual defendants, holding that they had no "interest whatever with respect to the contract and its performance other than that of the citizens and taxpayers, generally, of Indiana, an interest which that state in this suit fully represents." *Id.* at 174.

In *Kentucky* v. *Indiana*, the Court expressly noted that "[a]n individual citizen may be made a party where relief is properly sought as against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted." 281 U.S. at 173-74. But where the relief sought is "merely incidental to the complete relief to which the complainant would be entitled if it should prevail as against the defendant state"—such as the injunction against the prosecution of the individual defendants' state court suit—the individual defendant has "no standing to litigate on his own behalf the merits of a controversy which, properly viewed, lies solely between the states." *Id.* at 174. In other words, consistent with *New Jersey* v. *New York*, *Missouri* v. *Illinois*, *Arizona* v. *California*, and *Colorado* v. *Kansas*, one circumstance in which a citizen of a party state may properly become a party in an original action is where non-incidental relief is

sought against it by the plaintiff. *Cf. Texas* v. *New Jersey*, 379 U.S. 674 (1965) (private company allowed as a party in original jurisdiction action concerning which state could take title to property deemed abandoned by the company).

The Court also has allowed non-state entities to be parties to original actions where they have a "direct stake" in the action, although there is little precedent for what type of "direct stake" will suffice. In *Maryland* v. *Louisiana*, eight states filed an original action against the State of Louisiana, challenging a tax it was imposing on natural gas brought into the state. 451 U.S. at 734. The Court allowed intervention by 17 natural gas pipeline companies, which the Court found had a "direct stake in this controversy" because the tax fell on such entities as owners of the gas; the Court also noted that participation by the pipeline companies would assist in "a full exposition of the issues" and that it is "not unusual to permit intervention of private parties in original actions." *Id.* at 745 n.21. Thus, the Court allowed intervention even though the states challenging the tax could have been deemed to represent the pipelines' interests. The deciding factor appeared to be that the effect of the tax fell directly on the pipelines, making their interest more compelling than that of an average citizen of an affected state and making their expertise and knowledge valuable to a "full exposition" of the issues. *Id.*

In another case, *Texas* v. *Louisiana*, the Court allowed intervention by a non-state party whose property interests were at stake. That case involved boundary disputes between and among Texas, Louisiana and the United States, including a dispute over the lateral seaward boundary between Texas

and the United States extending into the Gulf of Mexico. 426 U.S. 465, 466 (1976). In connection with that issue, the United States claimed title to islands in the Sabine River. *Id.* The City of Port Arthur, Texas filed a motion to intervene, and the Court granted the motion. *Texas* v. *Louisiana*, 416 U.S. 965 (1974). The Court later explained that Port Arthur "was permitted to intervene for the purposes of protecting its interests in the island claims of the United States." 426 U.S. at 466. In *Utah* v. *United States*, 394 U.S. 89 (1969), the Court addressed a dispute between the State of Utah and the United States over title to the Great Salt Lake, including lands that had been exposed and rendered usable due to the shrinkage of the lake over the years. Morton International, Inc., a private company, sought to intervene in order to quiet its title to certain of the lands at issue. The Court noted that, if Utah had sought to rely upon Morton's title to the lands to defeat the claims of the United States, the motion "would have had a substantial basis," because "if Utah sought to invoke Morton's title to avoid payment to the United States, it would seem fairest to permit Morton to speak for itself." *Id.* at 92. Although the Court ultimately denied the motion because a stipulation between the United States and Utah had rendered the issue of Morton's title irrelevant, the Court's analysis suggests that if one of the state parties would rely substantially upon the ownership interests of a private party, fairness may dictate allowing that party to join the action. *Id.* at 92-93.

From these authorities may be distilled the following rule that governs the motions here: Although the Court's original jurisdiction presumptively is reserved for disputes between sovereign states over sovereign matters, non-state entities may become

parties to such original disputes in appropriate and compelling circumstances, such as where the non-state entity is the instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief, where the non-state entity has an independent property interest that is directly implicated by the original dispute or is a substantial factor in the dispute, where the non-state entity otherwise has a "direct stake" in the outcome of the action within the meaning of the Court's cases discussed above, or where, together with one or more of the above circumstances, the presence of the non-state entity would advance the "full exposition" of the issues.

VI.

The City of Charlotte is the largest municipality and provider of water supply and wastewater treatment services in the Catawba River Basin. Charlotte is the entity in North Carolina vested with authority to carry out the large majority of the inter-basin transfers of which South Carolina complains. In the Complaint, South Carolina objects to three specific inter-basin authorizations for the transfer of water from the Catawba River—those granted to Charlotte-Mecklenburg Utilities, Concord and Kannapolis, and Union County—complaining that these transfers improperly reduce the flow of water into South Carolina. Such transfers, South Carolina says, exacerbate existing natural flow and drought conditions that contribute to low flow in the Catawba, thereby causing harm to South Carolina. As to the Charlotte transfer in particular, South Carolina states:

> In March 2002, the [North Carolina Environmental Management Commission] granted the application by the Charlotte Mecklenburg Utili-

> ties to transfer up to 33 million gallons per day from the Catawba River Basin to the Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied. This permit, moreover, was granted in the midst of the severe drought affecting the Catawba River from 1998 through 2002, and these inequitable withdrawals of water from the Catawba River necessarily exacerbated the harms that drought was imposing on South Carolina and its citizens.

Complaint ¶ 20(a).

As noted above and discussed in more detail in the September 14, 2008 order regarding the scope of the action, the focus of South Carolina's Complaint is the North Carolina inter-basin transfer statute and a small number of authorizations granted under that statute for transfers of water from the Catawba—including the permit held by Charlotte. In this respect, Charlotte's claimed interest is not just that of a user of water—a type of interest that the Court generally has not considered sufficiently "compelling" to justify intervention. *See New Jersey* v. *New York*, 345 U.S. at 373. Rather, Charlotte—which, like the City of New York in *New Jersey* v. *New York*, is the entity effectuating the "actual diversion of the water for its use," 345 U.S. at 370-71—is the "authorized agent" of a large part of South Carolina's claimed injury. *Id.* at 375. An injunction invalidating all or a portion of North Carolina's inter-basin transfer statute or the permits granted thereunder would affect Charlotte directly, such that it should be permitted to defend itself. *Utah* v. *United States*, 394 U.S. at 92. Even though Charlotte has not been named by South Carolina as a defendant, for practical purposes non-incidental relief is sought

against it, and it "should have suitable opportunity to show the nature of [its] interest and why the relief against [it] individually should not be granted." *Kentucky* v. *Indiana*, 281 U.S. at 173-74.

That North Carolina already is a party to this action should not foreclose intervention by Charlotte. In *New Jersey* v. *New York*, the Court stated that intervention may be allowed where the compelling interest shown by the proposed intervenor is "not properly represented by the state." 345 U.S. at 373. Although the Court did not elaborate on this standard, there is no indication the Court intended this to mean that there must be a conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's interests. As noted above, the Court has allowed municipalities and other entities to participate as defendants in original actions where their interests are directly challenged, such as where the complaining state challenges a diversion of water to that municipality. It has done so even where the state in which the municipality was located was a party to the action and had interests aligned with those of the municipality. *See, e.g.*, *New Jersey* v. *New York*, 345 U.S. at 375; *Missouri* v. *Illinois*, 180 U.S. at 242; *Kansas* v. *Colorado*, 206 U.S. at 49.

In the context of motions to intervene, the Court has allowed intervention where a concrete property right or other interest of the intervenor was at issue, even where it appeared that one of the party states would assert that same interest in support of its claim or defense. As discussed above, the Court allowed Port Arthur, Texas to intervene in a case involving a boundary dispute among Texas, Louisiana and the United States. *Texas* v. *Louisiana*, 416 U.S.

965. Boundary disputes between states, like other original actions, implicate core sovereign interests. Although Texas presumably could have represented Port Arthur's interests, the Court allowed Port Arthur to intervene for the "purposes of protecting its interests in [certain real property]." *Texas* v. *Louisiana*, 426 U.S. at 466. *See also Maryland* v. *Louisiana*, 451 U.S. at 745 n.21 (allowing intervention by oil companies, even though the complaining states would have advanced the same interests as the intervenors); *Utah* v. *United States*, 394 U.S. at 92 (noting that intervention motion by private company would have "substantial basis" if the responding state would rely upon that company's title to defeat claims of the United States). Under these precedents, the fact that North Carolina's interests may be similar to Charlottes' does not preclude it from appearing and defending its transfer permit. *See Kentucky* v. *Indiana*, 281 U.S. at 173-74.

South Carolina objects that the Court never has permitted a private person or non-sovereign entity, including a municipality, to intervene in an original equitable apportionment action. But this frames the issue too narrowly: There is no special rule applicable only to equitable apportionment cases that precludes intervention by non-sovereigns. To the contrary, original jurisdiction actions by definition implicate sovereign interests, and the Court's precedents firmly establish that non-state entities may participate in original actions in appropriate circumstances. As noted above, the Court has allowed non-sovereigns to intervene in other types of original actions. *See Texas* v. *Louisiana*, 426 U.S. at 466; *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922); *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21. The Court has allowed intervention in water disputes between states,

albeit by third-party states or other sovereigns. *See Arizona* v. *California*, 460 U.S. 605, 614-15 (1983) (allowing Indian tribes to intervene); *New Jersey* v. *New York*, 280 U.S. 528 (1930) (allowing state to intervene). The Court has allowed plaintiff states to join non-sovereigns in original actions involving water disputes between states. *See New Jersey* v. *New York*, 283 U.S. 336 (1931); *Missouri* v. *Illinois*, 180 U.S. at 242; *Arizona* v. *California*, 373 U.S. at 551. The Court also has recognized that there are situations where the intervention of a citizen of a party state in an equitable apportionment action may be appropriate. *See New Jersey* v. *New York*, 345 U.S. at 373.

Charlotte's entitlement to intervene thus should not turn on whether a municipality previously has been allowed to intervene in this particular type of original action. For the reasons set out above, Charlotte has presented an interest sufficiently compelling and concrete to warrant intervention for the limited purpose of protecting its interest in defending the current inter-basin transfer regime, and its own permit in particular. *See Kentucky* v. *Indiana*, 281 U.S. at 174. Because Charlotte's right to intervene turns on its status as one of the recipients of the three interbasin transfers that South Carolina identifies in its Complaint, there is a practical limitation on the number of similarly situated entities that would be entitled to be made parties. *New Jersey* v. *New York*, 345 U.S. at 373.

VII.

CRWSP's motion to intervene is similar analytically to Charolotte's. CRWSP describes itself as a joint venture of units of government of North Carolina and South Carolina. The two participants in the

joint venture are Lancaster County Water and Sewer District ("Lancaster") and Union County. Lancaster is a special purpose district organized under the laws of South Carolina to furnish retail water and sewer services within Lancaster County, South Carolina. Union County is a North Carolina county that supplies water and sewer services within its borders. Union County is authorized under the North Carolina inter-basin transfer statute to transfer up to 5 million gallons per day from the Catawba River Basin.

Under the joint venture arrangement, Union County and Lancaster jointly own a water plant, site piping, and other real and personal property of CRWSP. The CRWSP plant is located in Lancaster County, South Carolina, which is where all of CRWSP's intake from the Catawba River occurs, including the water that Union County withdraws under North Carolina law. In total, CRWSP may draw 36 million gallons of water per day from the Catawba, and 5 of these 36 million gallons represent the Union County transfer about which South Carolina complains.

South Carolina argues that CRWSP is not a proper party because it is a mere user of water, and the purpose of an equitable apportionment action is to decide the rights of the party states as between each other and not among individual users. CRWSP is seeking to intervene not as a mere user of water, however, but as an entity carrying out the "actual diversion of water" that has been challenged by the plaintiff state. *New Jersey* v. *New York*, 345 U.S. at 375. CRWSP is in a position similar to Charlotte and the City of New York in *New Jersey* v. *New York*. Although CRWSP's entitlement under North Carolina law is smaller

than Charlotte's, it is one of the three transfers targeted by South Carolina in the Complaint. Like Charlotte, CRWSP is the "authorized agent for the execution of the sovereign policy which threaten[s] injury to the citizens of [South Carolina]." *Id.* at 375.

CRWSP asserts that neither North Carolina nor South Carolina can represent its interests fully because its corporate structure combines entities of both States. It contends that it is not fully a citizen of either State and that both States treat it as an independent and competitive third-party user of the Catawba River. This argument is not compelling, standing alone, as a basis for intervention. If CRWSP were an ordinary user of water—and not an "authorized agent" of injury with a direct stake in defending its North Carolina authorized transfer—the fact that its participants are citizens of both of the competing party states likely would not provide it with a sufficiently compelling basis to intervene in an original action. As South Carolina argues, municipalities cannot combine to form a sovereign. Rather, municipalities are creatures of state law, and any rights they enjoy "can rise no higher than those of [the party state.]" *Nebraska* v. *Wyoming*, 295 U.S. 40, 43 (1935).

Although CRWSP's dual citizenship status does not provide an independent basis for intervention, CRWSP, like Charlotte, has a "compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest in not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. at 373-74. For the same reasons as with Charlotte, CRWSP should be allowed to appear separately in order to defend its transfer, which is the subject of South Caro-

lina's claim for relief. CRWSP has a compelling interest in defending its ability to execute the transfer challenged by South Carolina and should be allowed to intervene for that limited purpose.

VIII.

Duke Energy is positioned differently from Charlotte and CRWSP. Duke is not the immediate target of a request by South Carolina for injunctive relief, and thus does not fall squarely within the cases in which a non-state entity was the "authorized agent" of injury to the complaining state was made a party. Nonetheless, for several reasons, Duke has several strong and independent interests that could affect, or be affected by, the outcome of this proceeding.

First, the outcome of any equitable apportionment of the Catawba will be affected by Duke's extensive development of the river over the course of the last century—and those operations in turn would be affected by any decree in this action. Since the early 20th century, both before and pursuant to its 1958 FPC license, Duke has operated reservoirs along the Catawba in North and South Carolina that allow it to generate hydroelectric power and supply cooling water for its nuclear power and coal-fired plants in the Catawba River basin. This system of waterworks has altered the Catawba from what would have been its natural flow absent such works. Duke asserts—and South Carolina does not dispute—that Duke's hydroelectric plants effectively control the flow of the Catawba through the impounding of water in reservoirs and the release of that impounded water. Any attempt to quantify the water that naturally would be available to South Carolina absent the complained-of transfers in North Carolina will require an analysis of Duke's operations and the flows that it is

required to maintain from its reservoirs into South Carolina. In addition, the "existing economies" created by Duke's operations—most notably businesses and communities dependent upon its facilities and operations, and others that depend upon Duke's extensive use of the Catawba for hydroelectric purposes—likely will be an important consideration. *See Colorado* v. *New Mexico*, 459 U.S. 176, 187 (1982). And because Duke controls the flow of the Catawba River—and in particular the outflow at Lake Wylie through which the Catawba flows into South Carolina—any Court-ordered alteration of the flow would be carried out by Duke and would directly affect its operations.

Second, and relatedly, the terms of Duke's existing and prospective licenses, as well as the negotiated terms agreed upon by relevant stakeholders through the CRA, are relevant to the proceedings here. Both Duke's existing 1958 FPC license and the agreed-to terms for its prospective FERC license set minimum flow requirements under various conditions, including times of drought. Duke's existing FPC license requires it to release specified amounts of impounded water at locations in North and South Carolina, in consultation with state agencies. Most notably, Duke's reservoir at Lake Wylie, which straddles the border between the States, is the immediate source of water from the Catawba flowing into South Carolina, and Duke's existing FPC license requires Duke to maintain a minimum average daily flow of 411 cubic feet per second into South Carolina from the Wylie dam. The CRA submitted with Duke's application for a new license requires increased flow rates during periods of normal rainfall and drought periods. It also sets a Low Inflow Protocol requiring conservation measures that become more stringent as low

flow conditions increase. Duke contends with some force that if a new license is granted, the issues of equitable apportionment raised by this action will have to be addressed in the context of the new minimum daily flow and other requirements. In addition, although the findings and recommendations in the CRA are not binding here, many of the same factors addressed in the agreement—such as natural flow, existing uses, and effect of drought conditions—would be considered in an apportionment inquiry. Duke correctly notes that it will provide a direct link to the CRA negotiations process and the FERC proceedings that will foster "a full exposition of the issues." *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21.

Even more significantly, there is a strong possibility that the terms agreed to by the relevant stakeholders in the CRA will be directly at issue in this litigation, thus triggering Duke's direct interest in preserving that agreement and its existing and prospective licenses. The terms of the CRA are central to the defenses asserted by North Carolina, which contends, in essence, that the CRA provides South Carolina with more than enough water to meet its needs, thus obviating this proceeding. Although South Carolina has equivocated on whether it intends to challenge the CRA in the action—for example, South Carolina claims that the CRA establishes a relevant benchmark for its entitlement to water from the Catawba, and cites data developed during the CRA negotiations, but at the same time appears to claim that the scientific models and assumptions underlying the CRA are subject to challenge or at least questionable—it seems clear that the terms memorialized in the CRA and mandated by any ensuing Duke license will be challenged, or relied upon, by one or both parties in this action. *Cf. Utah*

v. *United States*, 394 U.S. at 92. If the scientific data and conclusions that support the CRA, which in turn is the principal support for Duke's license application, will be placed in issue, it would seem fair and equitable to allow Duke to defend those data and conclusions, as well as the CRA and license application themselves. For this reason alone, Duke has a strong and direct stake in the outcome of this proceeding. *See Maryland* v. *Louisiana*, 451 U.S. at 745 n.21.

Third, at a minimum, the Court in this action would likely consider the *process* that Duke orchestrated as part of its relicensing application, namely the multi-stakeholder negotiation that resulted in the CRA. That process involved the participation and approval of multiple entities, including state natural resources departments, other state agencies, public water suppliers, local governments, and interest groups, among others, and produced detailed analyses and studies of the historical flow of the Catawba—both with and, hypothetically, without Duke's operations—as well as the historical, present, and projected uses of the river. South Carolina itself cites these studies in its Complaint, as does North Carolina in its Answer. *See* Complaint ¶ 16; Answer ¶ 16. The agreement among relevant stakeholders—including South Carolina's Department of Natural Resources—almost certainly will be considered in any equitable apportionment analysis, which would look to existing uses and needs of those affected by the flow of the river, including the stakeholders that joined the CRA.[1]

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[1] In addition to its arguments discussed in the text, Duke asserts that it is charged with protecting public interests recognized by federal law and protected by Duke's license under the Federal Power Act citing various statutory provisions that

In sum, the outcome of this action will affect Duke directly because Duke has significant control over the flow of the Catawba River, will be affected directly by any change in flow, and may have to alter its practices and the CRA if the assumptions underlying that agreement are altered through this litigation. Its interests are at least as compelling, if not more so, than the 17 pipelines companies that were allowed to intervene in *Maryland* v. *Louisiana*, *supra*.

IX.

In its motion for clarification or reconsideration of the May 27, 2008 order granting intervention, South Carolina offers several reasons why that order should be limited or changed. In a telephonic hearing held on July 17, 2008, the Special Master indicated that the motion would be denied. Following South Carolina's subsequent request that the intervention issue be addressed in an Interim Report—a request that was granted after briefing from the parties—the Special Master indicated that both the original reasons for the May 27, 2008 order and the reasons for the denial of the motion for clarification or reconsideration would be set forth in the Interim Report.

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govern FERC's own duties and the requirements for licenses issued by FERC. *See, e.g.*, 16 U.S.C. § 797(e) (FERC must take into account certain considerations in issuing licenses); 16 U.S.C. § 803(a)(1) (setting forth conditions for licenses). But none of the provisions and regulations cited by Duke states that Duke itself must determine and act upon the public interest, except indirectly by complying with the terms and conditions of its license as established by FERC through its own public interest obligations under the governing statutes and regulations. Accordingly, this "public interest" theory is not a factor in the analysis reflected in this Interim Report.

South Carolina's request for "clarification" turns on an artificially narrow construction of the May 27, 2008 order. At various points in the order (and in the analysis above), the Special Master stated that the Intervenors had an interest in the *outcome* of this action, or in the relief sought. South Carolina reads these references to say that the Intervenors' interests are limited to the *relief* that might be awarded in connection with any equitable apportionment. Under this reading, the Intervenors would have no interest in what the parties have called "Phase One" of the action, variously (and sometimes inconsistently) defined by the parties as being limited to the harms suffered by South Carolina, and/or the uses in North Carolina that have caused or contributed to those harms. South Carolina seeks to "clarify" that any participation by the Intervenors must be limited to the remedial phase ("Phase Two") and that they may not participate in what might be called the liability phase ("Phase One").

South Carolina's argument misperceives the basis for the May 27, 2008 order. The order did indicate that each of the Intervenors has an interest in the outcome of this action—that is, in preventing one or both of the state parties from obtaining the relief that they seek. In the case of Charlotte and CRWSP, the interest is in preventing a disposition inconsistent with the existing authorizations for interbasin transfers challenged in South Carolina's Complaint, including its request for injunctive relief. In the case of Duke, the interest is in preserving existing operations and the negotiated outcome set out in the CRA and in Duke's pending license application, to the extent that either state might seek an outcome contrary to the existing or agreed-to *status quo*. Although either or both of these interests may be identified by

reference to a preferred outcome of the action, that does not mean that the only interest that the Intervenors have is in the remedial phase. Rather, as with any litigant, they have an interest in the liability proceedings that could lead to the adverse result—including, for example, the question whether South Carolina has suffered harm as a result of particular interbasin transfers within the State of North Carolina (a "Phase One" question). To put the matter another way, the fact that it is the ultimate relief sought that may adversely affect the Intervenors does not logically or legally mean that their interests are limited to the remedial phase.

The May 27, 2008 order did indicate that the motions to intervene would be granted only for limited purposes. This was based upon the simple principle, conceded by the Intervenors, that an intervenor's participation in an original case should be directed toward protecting that intervenor's interests and not as a means to litigate all aspects of the dispute, even those that do not affect the intervenor. *See, e.g., Kentucky* v. *Indiana*, 281 U.S. at 173-74; *Utah* v. *United States*, 394 U.S. at 92. As the Special Master indicated at the July 17, 2008 hearing, particular issues or objections relating to participation by Intervenors may be addressed as part of the case management process.

That said, the limitation that South Carolina proposes—participation by Intervenors only in Phase Two—does not make practical sense in light of the nature of the Intervenors' interests and the manner in which discovery is proceeding. South Carolina appears to concede that Phase One would involve not only issues of harm to South Carolina, but also the uses and activities in and by North Carolina that al-

legedly are causing that harm. The Intervenors have an interest in addressing these Phase One issues, including the existence or nonexistence of harm to South Carolina from the Intervenors' own activities.

South Carolina asserts that it is not the specific uses of water in North Carolina that must be addressed in Phase One, but rather the cumulative uses in North Carolina that produce an alleged reduction in flow into South Carolina. Under this theory, any decree by the Court would simply limit North Carolina to a fixed amount of water that North Carolina could allocate to uses within the state—thus rendering irrelevant any consideration of particular existing uses by the Intervenors or other users. South Carolina cites no precedent supporting such a narrow conception of the apportionment inquiry—one that seems at odds with this Court's practice of engaging in a detailed consideration of existing uses and other conditions as part of an equitable apportionment analysis. Whatever parameters ultimately will define the various "Phases" of this action—a matter that currently is being addressed through the discovery and case management processes—it seems unlikely that the sole consideration for "Phase One" will be whether South Carolina has suffered a cumulative reduction in flow from the Catawba. Indeed, as a practical matter, the parties already have agreed that certain discovery may cover both Phase One and Phase Two in order to avoid duplication, thus complicating any proposed effort to limit participation to one Phase or the other.

For these reasons, South Carolina's request for "clarification" of the May 27, 2008 order is not well taken.

X.

South Carolina also requested that the Special Master reconsider the merits of the May 27, 2008 order. This request was made before South Carolina asked the Special Master to issue an Interim Report on the subject of intervention. For the reasons that follow, South Carolina's arguments do not provide a basis for denying intervention.

South Carolina's principal argument with respect to the two municipal entities, Charlotte and CRWSP, is that the May 27, 2008 order placed too much emphasis on the authorizations held by these entities to transfer water from the Catawba River Basin under North Carolina's interbasin transfer statute. This argument takes several forms, none of which would appear to change the result reached in the May 27, 2008 order.

First, South Carolina argues that the authorizations held by these entities cannot justify intervention because they are created solely by state law, and this Court has made clear that federal common law—not state law—governs the equitable apportionment analysis. *See Illinois* v. *Milwaukee*, 406 U.S. 91, 103, 105 & n.7 (1972); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). According to South Carolina, state law permits and other authorizations are irrelevant because they would be overridden by whatever apportionment the Court makes as a matter of federal common law. This argument does not accurately state the role of state law in the equitable apportionment analysis. Although federal common law ultimately controls any equitable apportionment by this Court, state law is not irrelevant. Indeed, in some cases, the Court has looked to state law as the federal common law rule in

the case—as, for example, where both states recognize the same state law water rights rules and the Court determines that following those rules is the most fair and equitable course. This has occurred with some regularity, for example, in cases where both states parties follow the rule of prior appropriation. *See, e.g.*, *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945); *Colorado* v. *New Mexico*, 459 U.S. 176, 183 (1982); *Wyoming* v. *Colorado*, 259 U.S. 419, 470 (1922). State law also plays an indirect role where state law rights or other interests or uses are considered as part of the equitable apportionment analysis. *See Connecticut* v. *Massachusetts*, 282 U.S. 660, 670-71 (1931) (equitable apportionment analysis depends "upon a consideration of the pertinent laws of the contending States and all other relevant facts"). The Court consistently has held that state law, and water uses authorized by state law, are to be considered and weighed as the circumstances require.

Here, it is likely that state-created rights and interests, including the authorizations held by Charlotte and CRWSP to transfer water from the Catawba River Basin for use by their customers and citizens, will be considered in any equitable apportionment of the Catawba. For example, "the extent of established uses" and "the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former" are among the factors the Court has considered. *Nebraska* v. *Wyoming*, 325 U.S. at 618. The Court also would take into account the degree to which users and customers have come to rely upon those state law transfer rights. In light of the Court's consistent practice of considering state law interests and uses as part of an equitable apportionment analysis, South Carolina's

assertion that such interests are irrelevant seems overstated.

South Carolina next asserts that the May 27, 2008 order inappropriately cast South Carolina's case as being focused on interbasin transfers, when in fact such transfers were only "mentioned" as part of a broader equitable apportionment analysis looking to the cumulative effect of all North Carolina uses of the Catawba River. This broader approach, South Carolina argues, sets this action apart from the cases cited above in which a municipality was named as a defendant because it was the instrumentality of the complained-of injury. But a fair reading of South Carolina's Complaint and other papers, including its preliminary injunction motion, shows that interbasin transfers are not merely "mentioned," but are the primary if not exclusive means by which South Carolina claims to have been harmed. The focus on transfers is so pervasive that North Carolina—with substantial justification—tried to limit the action and any ensuing discovery to the question of interbasin transfers. Although the Special Master concluded that such a limitation was not warranted at this stage, that decision was based upon South Carolina's prayer for relief, the corresponding breadth of permissible discovery, and the preliminary stage of the proceedings. The decision did not conclude that interbasin transfers are not central to the Complaint (they are) or that South Carolina did not seek to enjoin the transfers to these municipalities authorized by North Carolina (it does).

South Carolina next repeats its argument that this Court's cases in which municipalities were named as defendants—cited in the May 27, 2008 order—are irrelevant because the non-state parties in those cases

were named as defendants by the complaining state, as opposed to being granted leave to intervene by the Court. South Carolina notes that this Court never has granted leave to a non-state entity to intervene in an equitable apportionment case—a point discussed in the May 27, 2008 order and again above. It is true that there is no direct precedent permitting intervention under the circumstances presented here, but nor is there direct precedent denying intervention. The closest case is *New Jersey* v. *New York*, in which the City of Philadelphia sought to intervene as a plaintiff in a long-pending action by the State of New Jersey against the City of New York and the State of New York. As discussed above, the other parties opposed the motion, in part because addition of Philadelphia as a plaintiff would violate the Eleventh Amendment. In denying the motion, the Court distinguished Philadelphia from the City of New York, which had been named by New Jersey as a defendant. 345 U.S. at 375. The Court noted that New York City "was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey," and went on to note that its presence as a defendant created "no problems under the Eleventh Amendment." *Id.* With the exception of being "forcibly joined," these same factors are present here with respect to Charlotte and CRWSP.

Finally, South Carolina argues that the interests of Charlotte and CRWSP can be represented by North Carolina, so that there is no need for them to intervene as parties. Although this argument draws upon the test for intervention articulated in *New Jersey* v. *New York*, 345 U.S. at 373, the fact remains that this Court has allowed intervention by non-state entities

in numerous cases where it was likely that one or more of the state parties would advance positions that would protect the non-state entity's interest. *See, e.g.*, *Texas* v. *Louisiana*, 426 U.S. at 466 (allowing Port Arthur, Texas to intervene in a case in which Texas was a party and presumably would have advanced the same interests); *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21 (permitting intervention by oil companies, even though the complaining states had the same interests). In these cases, the Court appears to have concluded that an entity whose concrete interests were directly at stake should have an opportunity to "speak for itself." *See Utah* v. *United States*, 394 U.S. at 92. And in the municipality cases discussed above, where the requested coercive relief would directly affect the municipality's interests, the Court allowed the municipality to be named as a party defendant even though its interests clearly were aligned with those of the defendant state or states. *See, e.g.*, *Missouri* v. *Illinois*, 180 U.S. at 242; *Arizona* v. *California*, 373 U.S. at 551; *New York* v. *New Jersey*, 256 U.S. at 302. All of these cases are consistent with the general rule that a non-state entity may properly be a party to an original action where it has a "direct stake" in the controversy. *See Maryland* v. *Louisiana*, 451 U.S. at 745 n.21. That rule applies to Charlotte and CRWSP, whose vested state interests are directly challenged by South Carolina's Complaint.

As for Duke Energy, South Carolina argues that the May 27, 2008 order was erroneous in several respects, but none of these arguments changes the conclusions reached in that order.

South Carolina first argues that Duke's interests are not threatened in this action because South

Carolina's Complaint seeks to *reduce* consumption by North Carolina—a result that would increase the water available to Duke for power generation. But, as Duke notes, Duke also has an interest in defending the flow requirements agreed to in the CRA against any demand by either party that would threaten or deviate from those requirements. South Carolina has not indicated clearly whether it is seeking an allocation that would be inconsistent with these flow requirements—*i.e.*, that would require a flow greater than that provided for by the CRA (or Duke's existing license). What the Complaint does clearly state is that the Catawba River is subject to reduced flow conditions, that these conditions are exacerbated by North Carolina's interbasin transfers, and that the Court should issue a decree granting South Carolina some unspecified apportionment of water from the river. As discussed above and in the May 27, 2008 order, it would be difficult if not impossible to analyze the request by South Carolina for a greater apportionment of water than it currently is receiving without reference to the flow requirements of the CRA, given that it is those flow requirements—and not solely the uses of water by North Carolina—that immediately govern how much water from the Catawba makes its way into South Carolina. At a minimum, the minimum flow requirements of the CRA are highly relevant to the question of actual or potential harm to South Carolina's interests.

South Carolina argues that reference to the CRA in this action would be improper because it would amount to "review" of a FERC order—a remedy that, by statute, must be sought exclusively in the Court of Appeals and not through an original proceeding in this Court. South Carolina does not refer to any authority for the proposition that mere consideration of

license requirements as part of an equitable apportionment analysis would constitute impermissible "review" of the administrative order granting the license. Duke's professed objective in this proceeding is to defend the CRA and any FPC or FERC license that it holds; if any other party, such as South Carolina, seeks to invalidate the license as part of an apportionment request, then the concern offered by South Carolina would be presented more directly. It seems unwise and unnecessary to prejudge at this stage the legal issues that would arise if the equitable allocation sought by either party would require invalidation of a license granted by FERC pursuant to its operative statute—issues that presumably would be the subject of legal briefing and might warrant soliciting the views of the United States. It suffices here to say that Duke has a strong interest in defending its license and the CRA that supports its pending license application.

Finally, it is noteworthy that South Carolina has identified no concrete prejudice from intervention by Duke. To the contrary, since the May 27, 2008 intervention order was issued, South Carolina has issued extensive discovery to Duke, including discovery seeking to test the scientific models used to support the flow requirements used in the CRA and in Duke's pending license application. Even if South Carolina had tried to "plead around" the CRA—which it did not—the issue has been squarely raised and presented by North Carolina, both on the issue of harm to South Carolina and in its affirmative defenses. The only apparent prejudice from Duke's participation would be a more zealous defense of the CRA than would be provided if intervention were denied. Again, if the CRA is to be placed in issue, Duke should be permitted to defend it.

XI.

For the reasons stated above, the Special Master recommends that the Court permit the interventions of Charlotte, CRWSP, and Duke Energy, and deny South Carolina's motion for clarification or reconsideration of the May 27, 2008 order.

Respectfully submitted,

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November 25, 2008